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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 906

CHARLES L. ENGELSHER, M.D., as Director, Owner and Licensee of a private proprietary hospital known as "PARKCHESTER GENERAL HOSPITAL."

Petitioner,

against

MORRIS A. JACOBS, M.D., as Commissioner of Hospitals of the City of New York and as Chairman of the Board of Hospitals of the City of New York,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

There were no opinions at the Special Term of the New York Supreme Court or in the Appellate Division thereof. The opinion of the New York Court of Appeals and the dissenting opinion therein are reported at 5 N Y 2d 370, 157 N.E.2d 626.

Jurisdiction

The order of the New York Court of Appeals was entered March 13, 1959. Jurisdiction is invoked under 28 U.S.C., Section 1257(3).

Questions Presented

1. Whether a requirement that there shall be available for each hospital bed a minimum area of 70 square feet, included in a comprehensive set of legislatively authorized regulations applicable to hospitals operated for profit but not applicable to non-profit institutions, because of its limited applicability deprives petitioner, a profit-making hospital operator, of the equal protection of the laws.

2. Whether the minimum area requirement, which will compel petitioner, as a condition of his continued operation, to reduce the number of beds in his hospital from 130 to 100 or to alter the size of existing rooms if the required reduction is to be minimized, the capacity of 130 beds having long been permitted under previously applicable regulations, deprives petitioner of his property without due process, where it does not appear that the requirement is not reasonably related to the protection of patients' health and safety.

Legislation and Regulations Involved

In addition to the "Statutory Provisions in Point" set forth at pp. 4-7 of the Petition, there may be noted the following provision of the Hospital Code of the City of New York:

> "§40. *Definitions.* When used in this code or in the regulations of the Board of Hospitals relating thereto unless otherwise expressly stated the following definitions shall apply:
>
> 1. 'Private proprietary hospital' 'proprietary hospital,' or 'hospital' shall be held to mean an institution operated for the purpose of providing therein for

profit, services, facilities and beds for two or more persons, not related to the licensee, who require diagnosis, treatment, or care for illness, injury, deformity, infirmity or pregnancy, where such persons are kept for twenty-four (24) or more consecutive hours."

Statement

Petitioner since 1940 has owned and operated a proprietary hospital (33-34). In 1956 the Hospital Code superseded regulations which had been theretofore applicable (61). It continued old requirements regarding separation of beds from each other and from walls, but it added the requirement that each bed should have a minimum available area of 70 square feet (62-65). Other requirements were also added (68-70).

Conditions in petitioner's hospital were such as to place it in violation of the new requirements (70-71), and he applied for variances thereof (73). They were largely denied, and petitioner was directed, because of his failure to comply with the Code, to discontinue operation of his hospital (292-294). A renewal of his license had been denied for failure of compliance (304-305, 403-404).

This proceeding was brought to annul the direction to discontinue, and to compel the grant of the variances and the issuance of a license (119-120). Thereafter petitioner abandoned his demand for variances and sought to compel his licensure on the ground that the regulations, for violations of which a license had been refused, were constitutionally invalid. In this Court he attacks only the area requirement as above described (Pet., pp. 2-3).

Respondent initially interposed a procedural objection (351), and also the objection that in no event was petitioner

entitled to a license since his operation violated a requirement of law the validity of which was not questioned (329, 429). These objections were later withdrawn in the New York courts.

Petitioner asserted that the new area requirement would compel the reduction of the number of beds in his hospital from 130 to 100. An unspecified portion of this reduction, it was alleged, would be necessitated by the fact that the rooms having an area of 125 square feet would be usable for only one bed (112-113). It does not appear how much of a reduction would be required if petitioner were to join the area of these rooms by combining them with each other or with other rooms. Petitioner asserted that the required reduction in the number of beds would cause him "substantial loss" (113). It was not asserted that compliance was incompatible with continued profitable operation of the hospital.

POINT I

There is no substantial question regarding equal protection of the law.

(a)

The classification which includes only hospitals operated for profit is not arbitrary. "Statutory discrimination between classes which are in fact different must be presumed to be relevant to a permissible legislative purpose, and will not be deemed to be a denial of equal protection if any set of facts could be conceived which would support it." *Asbury Hospital* v. *Cass County*, 326 U.S. 207, 215 (1945).

It is conceivable that, when hospitals are operated for profit, there will be a greater tendency to overcrowd them than there would be when they are not so operated. The

more beds there are, the greater the revenues; fewer beds mean lesser profits, as petitioner himself asserts (112-113; Pet., p. 17).

In Hayt & Hayt, *Legal Guide for American Hospitals* (N.Y., 1940), the following statement is made (p. 70):

> "'There is greater tendency for states and local governments to regulate for-profit hospitals than there is to control charitable institutions. As with maternity hospitals, the regulations in the various states affecting private hospitals differ from one another. The influence of the standardization program of the American College of Surgeons has made state regulation of charitable hospitals less necessary than for private hospitals; voluntary institutions desire to be accredited; private hospitals, because they are smaller and for various other reasons, rarely can meet the minimum requirements of the American College of Surgeons.' [Citing Waas, M.D., Frederick J., Need of Cooperation between the Medical Staff and the Hospital Governing Body, *Hospitals*, p. 104, April 1940.]"

While non-profit making institutions may also overcrowd, the legislative body may have thought that the problem was more acute in the case of profit making ones. The dissent below notes that non-profit hospitals as well as profit making ones are subject to pressures to overcrowd which are not dependent upon profits (Pet., pp. 31-32). But, if the profit element can conceivably make the total pressure greater in the one situation than in the other, differential regulation is justified.

"Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner* v. *Texas*, 310 U.S. 141. Or the reform may take one step at a time, addressing itself

to the phase of the problem which seems most acute to the legislative mind. *Semler* v. *Dental Examiners*, 294 U.S. 608. The legislature may select one phase of one field and apply a remedy there, neglecting the others. *A. F. of L.* v. *American Sash Co.*, 335 U.S. 538." *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955).

The discussion of motive in the dissenting opinion (Pet., p. 31) misses the point of the regulations, which is to prevent overcrowding in situations in which such a condition is more likely to exist than in other situations; not to determine whether there has been overcrowding at any given time and place; and not to punish, where it has existed, because profit has been the motive.

It is urged in the dissent below that, since the regulations allow a non-profit hospital to do what a profit making hospital cannot do, the regulation has no relation to the public health, since legality turns not on the practice but on the practitioner (Pet., p. 32). But, as we have noted, the legislative body may have concluded that non-profit hospitals as a class do not present the same problem of overcrowding. An argument similar to the one here made in the dissent below was rejected by this Court in *Railway Express* v. *New York*, 336 U.S. 106, 109-110 (1949):

If the legislature believes that an evil exists in certain cases, "it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed." *Central Lumber Co.* v. *South Dakota*, 226 U.S. 157, 160 (1912). "It is not enough to invalidate the law that others may do the same thing and go unpunished if, as a matter of fact, it is found that the danger is characteristic of the class named". *Patsone* v. *Pennsylvania*, 232 U.S. 138, 144 (1913). "It is no requirement of equal protection

that all evils of the same genus be eradicated or none at all". *Railway Express* v. *New York*, 336 U.S. 106, 110 (1949).

This Court has recognized the validity of distinctions based upon intangibles of prejudice, of sensibilities regarding display of the flag, and of comparative exposure to moral temptation. See, respectively; *Bryant* v. *Zimmerman*, 278 U.S. 63 (1928); *Halter* v. *Nebraska*, 205 U.S. 34 (1907); *Goesaert* v. *Cleary*, 335 U.S. 464 (1948). It is not patently less reasonable, in a society heavily weighted with materialistic, competitive values, to make a classification based upon whether a money-making operation is involved.

We do not suggest that differential regulation is always warranted when goods or services affecting health or safety are sold for profit. But this is not a situation involving aspirins or automobiles. Here there is no competition to educate consumer preference, no opportunity to exercise such preference as may exist, and no basis on which to make a competent lay evaluation of what is being received. Moreover, a dissatisfied hospital patient cannot, like the ordinary consumer, switch brands or dealers. He must usually wait until he is no longer a patient.

(b)

Petitioner points to certain exceptions in the Code, made in favor of old licensees, and implies that, somehow, somebody has been given a consideration that has been denied to him (Pet., pp. 18-19). But nothing has been conceded to old licensees which has been withheld from petitioner. Nor is there any exception regarding the minimum area requirement here involved.

(c)

The brief of *amicus* is devoted largely to establishing that the Board of Hospitals, which promulgated the Hospital Code, has power to regulate non-profit and municipal

hospitals. Based upon considerations which are purely local in character, we disagree with the analysis made by *amicus*. But in any event, the argument of *amicus* is intended to refute a contention that regulation of profit hospitals only is justified because there is no power to regulate other types (Brief of *amicus*, p. 6). We have made no such argument. Assuming, *arguendo*, that there is power to regulate as *amicus* urges, we stand on the position asserted in (a) of this point.

POINT II

There is no substantial due process question.

Petitioner does not urge that the area requirement is unrelated to the protection of patients' health and safety. He seems to urge that since his operation satisfied existing legal requirements, the latter could not be changed if the effect is to reduce his profits (Pet., pp. 14, 17, 20). That is not the law. *Queenside Hills Co.* v. *Saxl*, 328 U.S. 80 (1946).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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May 22, 1959

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BRIEF OF ASSOCIATION OF PRIVATE HOSPITALS, INC. AS *AMICUS CURIAE*

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BRIEF OF ASSOCIATION OF PRIVATE HOSPITALS, INC. AS *AMICUS CURIAE*

Statement

This brief of the Association of Private Hospitals, Inc. as *Amicus Curiae* is being filed pursuant to Rule 42 of the Supreme Court Rules, with the consent of the parties.

This brief is being submitted in support of the Petition for a Writ of Certiorari filed with the Clerk of the Supreme Court on or about the 11th day of May, 1959 by the petitioner, Charles L. Engelsher and in support of his application for a stay made the same day.